INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Facts	2
Specification of Errors to be Urged	5
Reasons for Granting the Writ	5
Argument and Brief	6
Conclusion	14

TABLE OF CASES CITED

Barber Asphalt Paving Company v. Standard Asphalt & Rubber Company 275 U. S. 372, 387, 72 L. Ed. 318	12
Bell v. Hood 327 U. S. 678, 90 L. Ed. 939	11
Glenwood Light Co. v. Mutual Light Company 239 U. S. 121, 60 L. Ed. 174	11
Hilton v. Sullivan 334 U. S. 323, 92 L. Ed. Pg. 1416	7, 8, 13
Langes v. Green 282 U. S. 531, 75 L. Ed. 520 at Pg. 526	13
Longfellow v. Gudger 57 App. D. C. 50, 16 F. 2d 653, 656	8
Nord v. Griffin 86 Fed. 2d 481, 7th CCA	11
Order of Railway Conductors of America v. Pitney 326 U. S. 561, 566, 66 S. Ct. 322, 324, 90 L. Ed. 318	8
Primakow v. Railway Express Co. 56 Fed. Supp., 413 E. Dist. of Wisconsin	11
The Styria v. Morgan 186 U. S. 1, 9, 46 L. Ed. 1027	12
Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034	8

PAGE

Virginian R. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 8

Williams v. Fanning 332 U. S. 490, 68 S. Ct. 188 ..... 8, 13

AUTHORITIES CITED

Act of August 23, 1912, 37 Stat. 413, 5 U. S. C. A. P. 648 7

Veterans Preference Act of 1944, 58 Stat. 390, 5 U. S. C. A. P. 861 7

STATUTES CITED

Title 28 U. S. C. Sec. 2101 (c) U. S. Judicial Code approved June 25, 1948 1

Title 28 U. S. C. 1653 ..... 4, 5, 10, 12

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

SYLVESTER D. JOY, ET AL,
Petitioners,

VS.

WESLEY MCLAREN HAGUE, ET AL,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, appellants below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above cause on the 28th day of June, 1949. (R. 126).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is set forth in the record pages 123 to 126 inclusive. (R. on 2d appeal)

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was rendered on June 28, 1949 (R. 126 - 2nd appeal). The jurisdiction of this Court invoked pursuant to Title 28 U. S. C. Section 2101 (c) of the United States Judicial Code approved June 25, 1948.

QUESTIONS PRESENTED

Whether the petitioners were entitled to the relief sought in the complaint and whether the United States Court of Appeals for the First Circuit erred in refusing to permit the petitioners to file an amended complaint setting forth facts sufficient to show jurisdiction in the District Court. The contention of the petitioners being that the said Court of Appeals abused its discretion in refusing to permit the amendment showing jurisdiction. All other questions of law were previously decided in favor of the petitioners on a former appeal.

STATUTES INVOLVED

The pertinent statutes will be fully discussed in the argument in support of this petition.

STATEMENT OF THE FACTS

The petitioners, at the time of the filing of the bill of complaint on October 2, 1947 (Trans. page 2 on first appeal), were employed in the Boston Naval Shipyard as civil-

ian employees of the United States. All of them were honorably discharged soldiers, sailors or marines, and each was entitled to Veterans Preference in their employment pursuant to the laws, regulations, and Executive Orders of the President of the United States. The respondents are the officials of the Boston Naval Shipyard. The suit was brought to restrain respondents from reducing the petitioners in rank, grade and salary in their respective positions in the Naval Shipyard. The facts alleged show that each of the petitioners had an efficiency rating of good or better, and that they were being reduced in rank, grade and salary while employees who were non-veterans were being retained in the positions from which the petitioners were being reduced in rank, grade and salary. In plain language, the undisputed facts, as pleaded and admitted, show that the respondents were admittedly violating the Veterans Preference laws, and that the acts the petitioners complained of were wilful and deliberate and in plain violation of the lawful rights of the petitioners.

Despite the fact that the said respondents were wilfully and deliberately violating the Veterans Preference laws, their illegal and unlawful actions were defended by the Department of Justice.

The United States Attorney for the District of Massachusetts filed a motion to dismiss the bill of complaint, (R. 9-10 Tr. first appeal) and among the grounds enumerated was that the complaint failed to allege that the plaintiffs have exhausted their right on appeal through Administrative agencies meaning the right of appeal given to the United States Civil Service Commission. The District Court (Judge Wyzanski) sustained the motion of the respondents and the cause was dismissed. (R. 11 - 1st appeal). An appeal was taken from the order of dismissal and on June 29, 1948, the United States Circuit Court of Appeals for the First Circuit rendered an opinion. (R. pp. 4, 5, 6 and 7 of second appeal). The Circuit Court reversed the

judgment of the District Court (168 Fed. 2d 825), and held that the rights of the petitioners were so fixed and determined by law that the action of the respondents was illegal and unlawful and to such an extent that it was not necessary that the petitioners exhaust any right on appeal, even though such a right existed.

Instead of accepting the opinion of the Circuit Court (now Court of Appeals) for the First Circuit, the respondents set about to find some other technical ground upon which to defeat this meritorious case. The answer set up further technical defenses, and after a motion had been made for a summary judgment on behalf of the petitioners (R. 12 second appeal), the respondents interposed a motion for a summary judgment, one of the grounds of which was that the complaint does not allege that the amount in controversy equals or exceeds $3,000.00 as to each plaintiff (R. 18, Record on Second Appeal). On December 17, 1948, Judge Wyzanski signed a memorandum (R. 105 Second Appeal) directing the petitioners to file affidavits on or before December 31, 1948 that each had an interest in said action to the extent of $3,000.00. This memorandum was construed by the petitioners to mean that the interest to the extent of $3,000.00 must be accrued damages. It was impossible to so plead because $3,000.00 damages had not yet accrued at the time of filing suit. Failing to comply with the Court's order the District Court on January 4, 1949 dismissed the action for the second time (R. 105, Second Appeal).

From the second dismissal, the petitioners again appealed to the United States Court of Appeals for the First Circuit. While such an appeal was pending, and shortly after appeal was taken, counsel for the petitioners discovered that the rule as to the amount of damages to the extent of $3,000.00 exclusive of interest and costs was not the amount of the accrued damages, "but the value of the objective to be obtained". Under this rule of law, clearly

applicable to the petitioners' cause of action, the petitioners could clearly show that they were able to comply with the requirements as to damages to the extent of $3,000.00.

Therefore on April 5, 1949, and in accordance with the amended statute which permits such amendments (Title 28 U. S. C. 1653) the petitioners made a motion in the said Court of Appeals for permission to amend the complaint to show the jurisdictional amount. (R. 113 Second Appeal). The motion was supplemented by the affidavits of the appealing petitioners shown on pages 113, 114, 115, 116, 117, 118 and 119 of the record on second appeal. The affidavits conform to all of the controlling authorities covering what may be considered "as the value of the objective to be obtained".

On June 28, 1949, the United States Court of Appeals for the First Circuit rendered an opinion and judgment denying the motion to amend the complaint to show jurisdictional facts. In other words, the only question passed upon in the Second Appeal of the petitioners was on the motion filed by the petitioners to amend the complaint to show jurisdictional facts. The Court of Appeals did not repudiate, revise or change the language of their former opinion holding that the petitioners had been unlawfully reduced in rank, grade and salary. The Court of Appeals refused to exercise their discretion vested in them under Title 28 U. S. C. 1653 to permit amendments showing jurisdictional facts.

The petitioners will contend that the decision of the United States Court of Appeals for the First Circuit rendered on June 28, 1949 shows that they did not exercise that "judicial discretion" which promotes the ends of right and justice. Petitioners contend in view of the earlier opinion of the Court of Appeals firmly establishing the rights of the petitioners that in the interest of right and justice the amendment should have been allowed. Judicial decisions should be based on what actually are the facts and the law

applicable, and not on technicalities as the decision appealed from in this case is based. Here is a case where the petitioners are clearly within the jurisdiction of the Court, where there is no question but what they are entitled to the relief sought not only under the decisions of the Court of Appeals who finally foreclosed their rights but also under the decisions of this high Court fixing firmly those rights as will be shown by the decisions hereinafter cited. The question of jurisdiction may be raised at any point in Federal Courts, and there is no reason why facts showing jurisdiction should not likewise be raised at any time and this was obviously the intent of the statute (28 U. S. C. 1653). This statute permits amendments on questions of jurisdiction in the Appellate Courts.

There should come a time when litigation should end, and when it affirmatively appears that the District Court had jurisdiction, and that the rights of the petitioners which are being openly and illegally violated by the respondents then, in the interest of right and justice, the relief sought should be granted. In denying the motion to amend the pleadings to show jurisdictional facts, the Court of Appeals did not exercise that judicial discretion as required under the decisions of this Honorable Court.

SPECIFICATION OF ERRORS TO BE URGED

The record in this case affirmatively shows that the District Court for the District of Massachusetts had jurisdiction in this cause and the petitioners were entitled to the relief prayed for in the complaint upon a showing of the jurisdictional facts as set forth in the motion to amend filed in the United States Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Court in that the United States Court of Appeals for the First Circuit has rendered a decision in conflict with the applicable decisions of this Honorable Court. Reference is made to the decisions cited in the Argument and Brief appearing hereafter in this connection. The petitioners assert that while the rights of the petitioners as Veteran Preference eligibles in employment of the government of the United States have been established by a decision of the United States Court of Appeals for the First Circuit, that Court in denying the motion of the petitioners to amend the complaint to show jurisdictional facts did not exercise a "judicial discretion" which would meet the interests of right and justice as required by the applicable decisions of this high Court.

ARGUMENT AND BRIEF

The respondents must admit at the very outset that the petitioners' rights to retention in their salary and grade in the Boston Naval Shipyard was being violated by the respondents. All of the petitioners were honorably discharged soldiers or sailors or marines with efficiency ratings of good or better and as such they were entitled to be retained in their grades and positions so long as such grades and positions existed in the Boston Naval Shipyard, and was not filled by other honorably discharged soldiers, sailors or marines. They, the petitioners, were not only reduced in rank, grade and salary, but the respondents retained in their positions and grades employees who had no preference in employment.

At the time that the suit was filed on October 2, 1947 (R. 2-9 First Appeal), the petitioners had not in fact been reduced in rank, grade and salary. The respondents then

intended to so reduce said petitioners and the complaint filed prayed (R. 8 First appeal) that the respondents be restrained from reducing or demoting the petitioners from the positions which they then held in governmental employment.

The District Court did not issue a restraining order. Upon a motion to dismiss, the District Court ordered the cause dismissed because of the alleged failure of the petitioners to exhaust administrative remedies. (R. 11 First Appeal) From this order of dismissal entered on October 14, 1947, the petitioners apealed to the United States Circuit Court of Appeals for the First Circuit.

On June 29, 1948, the said Circuit Court rendered an opinion (R. 4—Second Appeal—168 Fed. 2d 825) reversing the judgment of the District Court.

Pertinent parts of the opinion of the Circuit Court are quoted as follows:

> "The plaintiffs allege in their complaint that they enjoy permanent civil service status with efficiency ratings of 'good', and that the defendants are about 'to demote the plaintiffs to inferior positions at great loss of pay and prestige' while retaining non-veterans 'in the positions which rightfully belong' to them. It is not categorically alleged in the complaint, but counsel for the plaintiffs in brief and argument strenuously contend, and counsel for the defendants apparently concede, that the plaintiffs' threatened reduction in rank is due to a post-war reduction in the labor force employed in the Navy Yard.
>
> The plaintiffs' contention is that the defendants' action not only violates direct orders from the Secretary of the Navy but also contravenes the clear terms of applicable statutes, specifically the proviso of P. 4 of the Act of August 23, 1912, 37 Stat. 413, 5 U.S.C.A. P. 648, quoted hereinafter, and P. 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C.A. P. 861.
>
> The defendants appeared specially in the court below for the sole purpose of objecting to the jurisdiction of

the court and moved to dismiss on four grounds: failure to join the Secretary of the Navy; failure to join the members of the United States Civil Service Commission; because the action in essence is against the United States and it has not consented to be sued; and finally because 'the complaint fails to allege that the plaintiffs haxe exhausted, and in fact shows that they have not exhausted fair and adequate administrative remedies provided by the Veterans' Preference Act of 1944, 5 U.S.C.A. P. 851 et seq., including an appeal to and determination by the United States Civil Service Commission.' The court below dismissed the plaintiffs' complaint solely on this latter ground and the plaintiffs thereupon took the instant appeal.

(1) When this case was tried below, and even when it was argued before us on appeal, it was an open question whether the Veterans' Preference Act of 1944 narowed, or whether it left unaffected, the long-existing broad scope of the preferences given to veterans by the proviso of P. 4 of the Act of 1912, supra, which reads:

> "Provided, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary."

Now, however, this question has been put at rest. The very recent decision of the Supreme Court of the United States in Hilton v. Sullivan, 68 S. Ct. 1020, 1026, authoritatively establishes that Congress in the Veterans' Preference Act of 1944 did not intend to restrict, limit or narrow the scope of the benefits conferred upon veterans by earlier legislation, but instead intended to enlarge the preference in government employment they already enjoyed. And in the Hilton case the Supreme Court said that there was nothing ambiguous about the language of the 1912 proviso quoted above and that 'It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran.'

(2, 3) We are not concerned here with the full scope of the preference given to veterans by the statute as thus interpreted—whether it means that veterans with a rating of 'good' have to be retained on the government's payroll even though there may be no work remaining for them to do (see Longfellow v. Gudger, 57 App. D. C. 50, 16 F. 2d 653, 656), or whether veterans with that rating cannot be reduced from supervisory rank even though there may be no employees left for them to supervise. These are questions for consideration when they arise. The complaint as we read it alleges that the plaintiffs, being veterans with a rating of 'good', are about to be demoted from given supervisory positions while non-veterans, presumably with greater seniority, are being retained in those positions. Since this clearly alleges a violation of the plaintiffs' legal rights under the applicable statute as it is now construed, there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have before seeking to vindicate their rights in court, for, as the Supreme Court said in Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 566, 66 S. Ct. 322, 324, 90 L. Ed. 318, 'Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; Virginian R. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789.'

Thus in view of the decision in the Hilton case, the judgment appealed from must be set aside and the case remanded for rulings on the other grounds advanced by the defendants in support of their motion to dismiss, if they care to press them in view of the decision in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, decided after the case at bar was decided by the court below, and, if that court finds it appropriate, for determination on the merits.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion."

It is to be noted that in reaching the conclusion that judgment should be reversed, the Circuit Court relied upon the decision of this Honorable Court in the case of *Hilton v. Sullivan* (334 U. S., 323, 92 L. Ed. Pg. 1416).

The petitioners assert that the said Circuit Court of Appeals in reversing the judgment of dismissal in the first instance in the District Court correctly followed the decision of this Honorable Court in *Hilton v. Sullivan, supra.*

The petitioners therefore contend that the decision of the said Circuit Court of Appeals rendered on June 29, 1948 became the law of the case. It is clear beyond any question of a doubt that under this decision rights of the petitioners as veteran preference eligibles in governmental employment were being wilfully and deliberately violated by the respondents. The petitioners were clearly entitled to injunctional relief when the complaint was filed, and relief by mandatory injunction at the time that the cause was remanded to the District Court.

Instead of complying with the decision and mandate of the Circuit Court, the Department of Justice, and the respondents, set about to find other technical grounds upon which to defeat the petitioners' meritorious cause of action. The respondents on their own motion and without further litigation, could have complied with the ruling of the Circuit Court, but although they now knew that their acts were illegal and unlawful, they did not choose to take administraitve procedure which would and could have restored the petitioners to their rightful positions. They knew they were violating the laws granting preference to the petitioners but their conscience would not permit them to obey the laws of the United States, and to this day they have not obeyed the laws of the United States applicable to the preference granted to the petitioners in this case.

The Department of Justice did not ask for a writ of certiorari from the decision of the said Circuit Court of Appeals rendered on June 29, 1948. By inference they agreed that the decision was correct. Instead of advising the respondents to comply with what they now knew was the law of the case and thus disposing of this litigation, they interposed other motions in the case hoping that by piece meal litigation they would prolong the litigation thus discouraging the petitioners, and wear them out by litigation, all of the time knowing full well that the petitioners' rights were being openly and wilfully violated by the respondents. The picture in this regard is not a pretty one for a Department which was primarily organized to enforce laws, and to see that justice is received by the humblest citizen, and particularly to those who had served their country in her hour of need.

So when this case was remanded to the District Court the respondents then interposed a motion to dismiss upon the grounds that the complaint did not show that each plaintiff was damaged to the extent of $3,000.00 exclusive of interest and costs. This was the first time any such defense had been raised in the case. District Judge Wyzanski, on December 17, 1948, entered an order in the form of a memorandum directing the petitioners on or before December 31, 1948 to file affidavits showing that the amount in controversy as to each petitioner exceeded the sum of $3,000.00.

The petitioners' counsel construed this memorandum to mean that each of the petitioners must affirmatively show "accrued" damages at the time of filing of the suit in the amount of $3,000.00. Under this construction the petitioners could not comply, and there was no use in wasting the time of the Court if the petitioners were required to make a showing that at the time of the filing of the suit, damages in the amount of $3,000.00 had accrued. Failing to file such affidavits the District Court (Judge Wyzanski) dismissed the petitioners' action for the second time (R. 105-106 Second Appeal).

From this second order of dismissal, the petitioners again appealed to the United States Court of Appeals for the First Circuit. (R. 107 Second Appeal).

The sole question involved on the second appeal was whether the District Court erred in dismissing the petitioners' cause of action because of failure to allege damages to the extent of $3,000.00 less interest and costs.

While the appeal was pending and when the petitioners filed their brief on appeal, in fact, at the same time a motion was made to amend the complaint by alleging that the damages of each petitioner amounted to $3,000.00. This motion was supplemented by affidavits executed by the petitioners. (R. 113, 114, 115, 116, 117, 118 and 119 of Second Appeal).

The motion was predicated upon amendment to the Judicial Code as follows:

> "Title 28—
> Sec. 1653. Amendment of pleadings to show jurisdiction
> Defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts.

It will be noted that this provision of law permits amendments to the pleadings on questions of jurisdiction in the appellate courts. As previously explained, the petitioners construed the memorandum of the District Court requiring them to plead damages to the amount of $3,000.00 less interest and costs as "damages" then accrued. Obviously the petitioners could not comply with any such requirements. Petitioners then did not know that the amount of the damages could be measured by the "value of the objective to be obtained."

There is authority to the effect that the damages need not be "accrued" damages. An employee's seniority rights are individual employee's exclusive property rights and as such

are within the Fifth Amendment to the Constitution of the United States.

Primakow v. Railway Express Co. 56 Fed. Supp. 413 E. Dist. of Wisconsin.

The jurisdictional amount is to be measured by the value of the object to be gained by the complainant.

Nord v. Griffin 86 Fed. 2d 481, 7th CCA.

This has also been authoritatively determined by this Court.

Glenwood Light Co. v. Mutual Light Company, 239 U. S. 121, 60 L. Ed. 174.
Bell v. Hood 327 U. S. 678, 90 L. Ed. 939.

The affidavits of the petitioners filed in support of the motion to amend the complaint alleging damages to the extent of $3,000.00 less interest and costs show that each of the petitioners is a permanent civil service employee of the United States. That their loss in wages is approximately $600.00 per year, and also loss in retirement benefits due to their reduction in rank, grade and salary. It further shows that they are in good health and well able to perform the duties of the positions from which they were reduced in rank, grade and salary, and that the age of each petitioner is such that he will lose in wages during the time that he would be employed in the Boston Naval Shipyard an amount far in excess of $3,000.00. (R. 113, 114, 115, 116, 117, 118 and 119 Second Appeal).

The petitioners therefore made a showing by affidavits which is undisputed that the value of the object to be obtained by the action far exceeds the jurisdictional amount of $3,000.00.

The opinion of the United States Court of Appeals for the First Circuit on the second appeal (R. 123, 124, 125, and 126 Second Appeal) is predicated entirely upon the ground that the petitioners had their chance when it was

given to them by the District Court to plead the jurisdictional facts.

If the question of jurisdiction may be raised at any stage of the proceeding in Federal cases as contended by the respondents, it should likewise follow that at any time during the course of the proceedings the petitioners who are clearly entitled to the relief sought by the complaint should have an oportunity to plead facts to show jurisdiction. As explained before, counsel for the petitioners interpreted the District Court's memorandum to require them to show $3,000.00 "accrued" damages. This they clearly could not show. When it was discovered that the authorities permitted the amount of damages to be determined by the "value of the objective to be obtained", a motion was promptly made and a complete showing of the jurisdictional facts was made.

The statute permits this to be done in the Appellate Courts and makes no exceptions as to whether the right to plead such facts was given in the District Court. After all, the respondents did not plead lack of jurisdiction on the amount involved before the case went for the first time to the Circuit Court. They preferred to raise their defenses piece meal obviously to annoy the petitioners.

The statute permitting amendments on jurisdictional questions in the Appelate Courts is a short one and is again inserted.

"Title 28—

Sec. 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts.

Under this statute the Circuit Court clearly could have allowed the motion to amend to plead jurisdictional facts. The question arises did they properly exercise a "judicial discretion" vested in them. The petitioners insist that the

Court of Appeals did not exercise that discretion required of them in accordance with decisions of this Honorable Court.

This Court has reversed the decisions of U. S. Circuit Courts of Appeals where they failed to exercise a sound discretion.

> *Barber Asphalt Paving Company v. Standard Asphalt & Rubber Company* 275 U. S. 372, 387, 72 L. Ed. 318.

The word "discretion" denotes the absence of a hard and fast rule.

> *The Styria v. Morgan* 186 U. S. 1, 9, 46 L. Ed. 1027.

This Court said that when invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, *but regard to what is right and equitable under the circumstances and the law and directed by the reason and conscience of the judge to a just result.*

> *Langes v. Green* 282 U. S. 531, 75 L. Ed. 520, at page 526.

If this is still the rule in this Honorable Court and there is no authority found to the contrary, let us examine the facts in this case and the law applicable, to see whether the Court of Appeals for the First Circuit exercised its discretion in denying the motion to amend to show jurisdictional facts as to what is "right and equitable under the circumstances and law and directed by the reason and conscience of the judge to a just result".

The United States Court of Appeals for the First Circuit in its opinion on the first appeal (R. 4, 5, 6, and 7 Second appeal, 168 Fed. 2d 825) definitely held that the rights of the petitioners were being violated and that they were entitled to the relief prayed for in the complaint. The cause was remanded to the District Court for further pro-

ceedings in accordance with the opinion. In this opinion, the Circuit Court effectively disposed of the other questions raised in the first instance by the respondents by referring to the case of *Williams v Faninng,* 332 U. S. 490 (R. 7 Second Appeal).

Since the decision of the Circuit Court of Appeals for the First Circuit in its opinion on the first appeal (168 Fed. 2d 825) affirmatively established the law of the case if jurisdiction existed, and the opinion follows the decision of this Honorable Court in *Hilton v Sullivan* (334 U. S., 323, 92 L. Ed. Page 1416) the discretion exercised by the Court of Appeals in denying the motion to amend the pleadings to show jurisdictional facts must be measured by what is "right and equitable" under the circumstances and the law applicable.

How can it be said that the Court of Appeals exercised their "discretion" within the rule laid by this Court, when the petitioners, if jurisdiction existed, are entitled under the undisputed facts and law applicable thereto to the relief sought. Such jurisdiction did in fact exist and the record would so show if the Court of Appeals had allowed the motion of the petitioners to amend the complaint. Any other result reaches a conclusion shocking to judicial conscience if such may be said to exist. Such decisions as the Court of Appeals has made in this case cause laymen to lose faith in the judiciary, and lawyers to wonder whether cases are decided upon the skill of counsel or of right and justice according to the law and the facts. Here we have a case where the petitioners' right to relief is predicated not upon the fact that they are not entitled under the facts and the law to the relief but because the Court denies a motion to amend the pleadings to show jurisdiction.

For over two years these petitioners have tried to enforce their rights as Veteran Preference Eligibles in their employment by the United States. There should come a time when litigation should end. The Court of Appeals

could have terminated litigation by the allowance of the motion of the petitioners to amend the pleadings. That was all that was necessary to complete the litigation. Would not this have promoted right and justice, and would not this have followed the rule laid down by this Honorable Court in matters involving judicial discretion? This Court should grant a writ of certiorari in this case to prevent a serious miscarriage of justice.

CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the First Circuit, and that upon review the judgment of the said United States Court of Appeals be vacated, reversed and set aside, and this cause be remanded to the said Court with instructions to proceed further in accordance with the views of this Court.

CLAUDE L. DAWSON

917 - 15th Street, N. W.
Washington, D. C.

Attorney for the Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Clark v. *Paul Gray, Inc.*, 306 U. S. 583	6
Covington & Cincinnati Bridge Co. v. *Hager*, 203 U. S. 109	7
Cunard S.S. Co. v. *Sullivan*, 6 F. 2d 383	6
Graham v. *Norton*, 15 Wall. 427	7
Henneford v. *Nor. Pacific Ry.*, 303 U. S. 17	6
Jackson v. *Allen*, 132 U. S. 27	6
Kinney v. *Columbia Savings and Loan Association*, 191 U. S. 78	6
Knapp v. *Lake Shore R. Co.*, 197 U. S. 536	7
Miguel v. *McCarl*, 291 U. S. 442	7
Rosenbaum v. *Bauer*, 120 U. S. 450	7
Sun Printing & Publishing Association v. *Edwards*, 194 U. S. 377	6
Victory v. *Manning*, 128 F. 2d 415	6

Statutes:

Act of August 23, 1912, 37 Stat. 360, 413, as amended	3
28 U. S. C. 1653 (adapted from 28 U. S. C. (1946 ed.) 399))	2, 6
Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended 5 U. S. C. 861, 863	3

Miscellaneous:

Cyclopedia of Federal Procedure (2d ed.):	
§ 295	6
§ 1898	6



In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 345

SYLVESTER D. JOY, ET AL., PETITIONERS

v.

WESLEY MCLAREN HAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (2 R. 106)[1] is reported at 81 F. Supp. 590. The opinion of the Court of Appeals for the First Circuit (2 R. 123-126) is reported at 175 F. 2d 395.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1949 (2 R. 126). The petition for

---

[1] The record is printed in two volumes without continuous pagination. The designation (1 R.), therefore, will be used to refer to volume 1, and (2 R.) to volume 2.

a writ of certiorari was filed on September 22, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

A motion to dismiss the complaint was made in the district court on the ground that petitioners had not alleged the required jurisdictional amount in controversy. The District Court allowed petitioners two weeks to file an affidavit setting forth in detail evidence to support the necessary jurisdictional amount. Upon their failure to comply with this direction, the complaint was dismissed for lack of jurisdiction. Without further proceedings in the district court an appeal was taken which assigned as error the dismissal for lack of jurisdiction. In the appellate court, for the first time, petitioners filed a motion for leave to file an amended complaint, together with supporting affidavits, to show the jurisdiction of the district court. These affidavits were controverted in part by an opposing affidavit.

The question presented is whether, in these circumstances, the Court of Appeals was required to permit the amendment of the complaint and to resolve the factual differences in the opposing affidavits.

STATUTE INVOLVED

28 U. S. C. 1653 provides as follows:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT

This action was originally brought by petitioners, employees in the Boston Naval Shipyard, to restrain their proposed demotions as violations of the Act of August 23, 1912, 37 Stat. 360, 413, as amended, and the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended (1 R. 2-9, 11-12). The gist of the complaint was that the proposed demotions from their supervisory positions violated petitioners' statutory rights as honorably discharged veterans because nonveterans were being retained in similar positions (1 R. 7-8). The demotion of petitioners was proposed only after a comparison of their qualifications with those of competitors and a determination that their demotion would promote the efficiency of the service (2 R. 77, 78). This action was taken in reliance upon Section 14 of the Veterans Preference Act (5 U. S. C. 863), which, in contrast with Section 12 of the Act (5 U. S. C. 861), authorizes demotion "for such cause as will promote the efficiency of the service" (2 R. 77, 84, 86, 43-46, 74). Petitioners have been since demoted (2 R. 78) and now regard their action as one for a mandatory injunction to compel their restoration (Pet. 11).

Petitioners brought this action without taking advantage of their right to appeal to the Civil Service Commission provided by the Veterans Preference Act, as amended. 5 U. S. C. 863. For this reason, the complaint was dismissed by the

District Court on the ground that the petitioners had failed to exhaust their administrative remedy (1 R. 11; 74 F. Supp. 396). The Court of Appeals held that exhaustion of administrative remedy was unnecessary under the allegations of this case and reversed (2 R. 4-7; 168 F. 2d 825).

After the remand of the case, respondents moved to dismiss the complaint on the ground, among others, that the District Court lacked jurisdiction because petitioners had not alleged that the amount in controversy as to each of them was at least $3,000, and that the amount actually in controversy was, in fact, less (2 R. 17-18). Pursuant to this motion, the District Court, on December 17, 1948, directed that "if any plaintiff is prepared to show that his claim does involve such amount" he "file no later than December 31, 1948 an affidavit setting forth in detail the evidence on which he rests his claim that such an amount is in controversy" (2 R. 105). The petitioners made no attempt to comply with this direction and an order of dismissal for lack of jurisdiction was entered by the District Court on January 4, 1949 (2 R. 105-107).

Without attempting further steps in the District Court to correct the jurisdictional omissions, petitioners appealed from the judgment of dismissal (2 R. 107-108). In the Court of Appeals, for the first time, petitioners moved for leave to file an amended complaint alleging the necessary jurisdictional facts and submitted supporting affidavits (2 R. 113-119). Respondents filed an opposing affidavit which

controverted petitioners' allegations as to the amount in issue (2 R. 119-122). The Court of Appeals denied the motion and affirmed the dismissal for lack of jurisdiction (2 R. 126). The court held that the decision of the District Court was mandatory on the record before it, and declined to permit petitioners "to make a record of facts which they refused to make in the trial court" for the purpose of having it "declare this correct judgment erroneous, not because of anything the trial court did, but because of something which they now seek to inject into the record and which was never before that court" (2 R. 125).

ARGUMENT

1. Petitioners do not appear to contest the validity of the holding below with respect to the jurisdictional requirement, but urge that the Court of Appeals was required to permit them to file an amended complaint at the appellate level and to enlarge the record by accepting affidavits with respect to controverted facts. The issue posed is obviously not one of general importance as it can hardly be assumed that cases will frequently arise in which the opportunity to correct jurisdictional defects at the trial level is rejected only to be asserted in the appellate court as a matter of right.

Moreover, the court below was clearly correct in denying petitioners' motion. An appeal may not be sustained where the district court's judgment, on the record before it, is not disputed, but error is

asserted on the basis of a new record sought to be made in the court of appeals (see opinion below, 2 R. 125). Although affidavits may be received by appellate courts to establish their own jurisdiction, they will not be accepted "for the purpose of supplementing the record by showing the amount in controversy" because "review of the action of the district court in assuming jurisdiction is confined to the record before the district court." *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-590; *Henneford* v. *Nor. Pacific Ry.*, 303 U. S. 17.

The terms of 28 U. S. C. 1653 (adapted from 28 U. S. C. (1946 ed.) 399) do not touch this rule. The section provides that "defective allegations of jurisdiction may be amended" but says nothing concerning correction of a defective record. Thus amendments may appropriately be permitted only when the facts of record indicate the presence of jurisdiction which has been imperfectly alleged. See *Kinney* v. *Columbia Savings and Loan Association*, 191 U. S. 78; *Jackson* v. *Allen*, 132 U. S. 27; *Sun Printing & Publishing Association* v. *Edwards*, 194 U. S. 377; *Victory* v. *Manning*, 128 F. 2d 415, 417 (C. A. 3); *Cunard S.S. Co.* v. *Sullivan*, 6 F. 2d 383 (C. A. 2); Cyclopedia of Federal Procedure (2d ed.), §§ 295, 1898. The necessary jurisdictional facts did not appear on the face of the present record. And in any event, the discretion embodied in the provision of 28 U. S. C. 1653 that amendments may be made "upon terms" clearly justifies a denial by a court of appeals of leave to

amend where a party has failed to take advantage of the opportunity to amend upon the terms offered by the district court.

2. Even if petitioners had properly alleged and proved the requisite jurisdictional amounts, dismissal of their complaint was nevertheless justified because the District Court has no jurisdiction over mandamus actions. In the present posture of the proceeding, petitioners seek a mandatory injunction directing government officials to perform a duty which, under their theory, is clearly prescribed by statute (Pet. 11). If petitioners' theory of their case is correct, the action must fail as one for mandamus in a court which has no mandamus jurisdiction. This Court has made clear that an action for a mandatory injunction in similar circumstances "is in effect equivalent to a writ of mandamus, and governed by like considerations." *Miguel* v. *McCarl,* 291 U. S. 442, 452. But the decisions of this Court also establish beyond question that, except for the District Court for the District of Columbia, the federal district courts have no original jurisdiction to issue writs of mandamus. *Graham* v. *Norton,* 15 Wall. 427; *Rosenbaum* v. *Bauer,* 120 U. S. 450; *Knapp* v. *Lake Shore R. Co.,* 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager,* 203 U. S. 109.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
MORTON LIFTIN,
DAVID B. BLISS,
Attorneys.

OCTOBER 1949

U. S. GOVERNMENT PRINTING OFFICE: 1949 859316 249